UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: March 10, 1994

FAA Order No. 94-5

In the Matter of:	
MERRITT A. GRANT	Docket No. CP92SO0471

DECISION AND ORDER

This appeal arises from the law judge's decision finding that Respondent failed to file an answer in a timely fashion. Upon review of the record, the law judge's dismissal of Respondent's request for hearing is affirmed, and a $1000 civil penalty is assessed.[1/]

On October 9, 1992, Complainant filed the complaint, alleging that Respondent had violated 14 C.F.R. § 107.21(a)(1)[2/] by carrying two hunting knives and an

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1/ A copy of the law judge's decision is attached.

2/ Section 107.21(a)(1) of the Federal Aviation Regulations (FAR), 14 C.F.R. § 107.21(a)(1) provides:

> (a) [N]o person may have an explosive, incendiary, or deadly or dangerous weapon on or about the individual's person or accessible property -
>
> (1) When performance has begun of the inspection of the individual's person or accessible property before entering a sterile area[.]

unloaded gun with accessible ammunition in his carry-on luggage. It was alleged that Respondent, who intended to board an aircraft, had presented his carry-on bag for x-ray inspection before entering a sterile area.

Section 13.209(a) of the Rules of Practice in Civil Penalty Proceedings, 14 C.F.R. § 13.209(a), provides that a respondent must file an answer no later than 30 days after service of the complaint.[3/] Since the complaint was served by mail, Respondent also had the benefit of the "mailing rule,"[4/] giving him an additional 5 days to file his answer. As a result, Respondent's answer was due to be filed no later than November 13, 1992.

After the complaint was filed, Chief Administrative Law Judge John J. Mathias issued an order in which he discussed certain procedural requirements. In this order, the law judge cited Section 13.209(a) and discussed its requirement to file an answer.

3/ Section 13.209(a) of the Rules of Practice, 14 C.F.R. § 13.209(a), provides in pertinent part as follows:

> (a) Writing required. A respondent shall file a written answer to the complaint ... not later than 30 days after service of the complaint.

4/ Section 13.211(e) of the Rules of Practice, 14 C.F.R. § 13.211(e), provides:

> (e) Additional time after service by mail. Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days shall be added to the prescribed period.

Respondent filed a written request for an extension of time in which to file his answer.[5/] The law judge granted an extension until December 15, 1992, for Respondent to file the answer.[6/] The law judge wrote in this order:

> It should be noted that failure to file [an] answer to the complaint by December 15th may result in the dismissal of Respondent's request for hearing and the imposition of the $2000.00 civil penalty requested in the complaint.

Since this order was served by mail, the "mailing rule,"[7/] applied. As a result, Respondent was required to file the answer by December 20, 1992.

On January 14, 1993, the law judge issued an order dismissing Respondent's request for hearing and assessing a $2000 civil penalty. At the time that the law judge issued this order, he had not received an answer from Respondent. The law judge wrote in the order, "Following the December 15th

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5/ Since the answer was initially due on November 13, 1992, the written request for an extension of time dated November 22, 1992, could be viewed as late-filed. However, this case will not be decided on that ground.

In his order outlining the procedural requirements, the law judge mischaracterized Section 13.209(a), stating that "[t]he Rules of Practice provide that Respondent must file a written answer to the Complaint within 30 days of the receipt of the Complaint ...." (Emphasis added.) Under Section 13.209(a), the 30-day period begins with the date of service of the complaint.

Respondent has not argued that he thought that he was obligated to file the answer no later than 30 days (plus 5 days for mailing) from the date of receipt, rather than date of service, of the complaint. Nonetheless, because of the possible confusion caused by this mischaracterization and because of the absence of evidence regarding Respondent's date of receipt of the complaint, the issue of the timeliness of the request for extension of time is not decided.

6/ See Order Extending Filing Time (December 1, 1992).

7/ 14 C.F.R. § 13.211(e). See fn. 4, supra.

deadline Mr. Grant was contacted by my legal assistant and told that if an answer was not received forthwith he would be in default." Order Dismissing Request for Hearing and Assessing Civil Penalty at 1 (emphasis added). The law judge noted further that Respondent had not filed an answer despite three reminders of the requirement to file an answer: 1) the order setting forth procedural requirements; 2) the order granting an extension of time dated December 1, 1992; and 3) the conversation with the legal assistant.[8/]

The Hearing Docket received the answer from Respondent after the law judge had dismissed the case.[9/] The answer was filed on January 12, 1993.[10/]

8/ Also, it appears that Respondent was sent a copy of the Rules of Practice. See Complainant's Appeal Brief, Exhibit B (Notice of Proposed Civil Penalty), at 2.

9/ The Hearing Docket received it on January 21, 1993.

10/ Section 13.210(b) provides:

> (b) Date of filing. A document shall be considered to be filed on the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.

14 C.F.R. § 13.210(b)(emphasis added).

The certificate of service attached to the answer filed with the Hearing Docket was undated. Hence, the postmark date (January 12, 1993) will be considered to be the date of filing under Section 13.210(b).

Complainant noted in the reply brief that the certificate of service attached to the copy of the answer served on Complainant was dated January 4, 1993. Complainant attached a copy of the answer that it received to its reply brief. The handwritten service date is difficult to decipher, and it could also be read as "January 9, 1993." Regardless, the date of filing with the Hearing Docket must be determined based upon the document filed with the Hearing Docket, and not a copy served upon a party. See 14 C.F.R. § 13.210 (filing of documents) and § 13.211 (service of documents.).

It is held that Respondent's answer was late-filed. A late-filed answer will be excused only upon a showing of good cause. In the Matter of Metz, FAA Order No. 90-3 at 7-8 (January 29, 1990). 14 C.F.R. § 13.209(f).[11/] It is held in the case at bar that Respondent has failed to demonstrate good cause to excuse the late-filing of the answer.

Respondent argues that he answered the FAA's request in a timely fashion, and that when he was unable to file a timely response, he requested an extension of time. He argues further that there was a "mistake of facts," later clarified by the law judge's legal assistant, and that his conversation with the legal assistant should be construed as an oral request for an extension of time. Respondent's Appeal Brief at 3.

It is unclear what Respondent means when he argues that he responded to the FAA in a timely fashion, because he certainly did not file his answer on time. He may be arguing that he filed his response to the Notice of Proposed Civil Penalty or to the Final Notice of Proposed Civil Penalty in a timely fashion. It has previously been held, however, that responses to pre-complaint documents do not satisfy the requirement for an answer. See In the Matter of Barnhill, FAA Order No. 92-32 at 6 (May 5, 1992)(holding that a response to the letter of investigation was not a de facto answer). The law judge

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11/ Section 13.209(f) provides: "A person's failure to file an answer without good cause shall be deemed an admission of the truth of each allegation contained in the complaint." 14 C.F.R. § 13.209(f).

explained in his order regarding procedural requirements that if Respondent wanted to rely upon correspondence provided to the FAA during an earlier stage of the proceedings, Respondent would have to refile that letter as the answer.

Respondent did not explain what he meant when he wrote that there was a "mistake of facts" later clarified by the law judge's legal assistant, and upon review, no such mistake is apparent. Also, the Rules of Practice do not allow for oral ex parte requests for extension of time to file any document. As already explained in this decision, the answer was due to be filed no later than December 20th. Indeed, if Respondent did make an oral request for an extension of time, that oral ex parte request should not have been granted by the legal assistant. From the law judge's decision, it cannot be determined whether the legal assistant meant to give Respondent an extension of time or merely meant that the answer should be filed immediately (and then the law judge would make a ruling). If Respondent thought that he had been granted an extension of time, he, nonetheless, failed to comply, because instead of filing the answer immediately, he did not file until January 12, 1993.[12/]

Turning to the issue of sanction, Complainant seeks a $2000 civil penalty in this matter. In the past, it was held

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12/ Even if January 4, 1993, was deemed to be the filing date of the answer (see footnote 9 supra), the outcome of this decision would be the same. If the law judge's legal assistant spoke to Respondent on or before December 20, 1992, and indicated that the answer had to be filed immediately, the delay until January 4, 1993, belied a failure to act with due diligence. If the legal assistant spoke to Respondent after December 20, 1992, then Respondent's answer was already late.

that a $2000 civil penalty is appropriate in cases in which a boarding passenger has a concealed unloaded firearm with accessible ammunition in carry-on luggage. In the Matter of Lewis, FAA Order No. 91-3 at 6-7 (February 4, 1991); see In the Matter of Broyles, FAA Order No. 90-23 at 8 (September 14, 1990).

Upon further consideration, a $1000 civil penalty is deemed adequate in this case. Without a doubt, bringing or attempting to bring an unloaded firearm and ammunition in carry-on luggage, as well as two hunting knives, on an aircraft, is a very serious matter, even if Respondent did not intend to use the weapons for any wrongful purpose. Nevertheless, a $1000 civil penalty should constitute a sufficient punishment and deterrent against future similar violations in cases such as this one in which the individual: 1) did not intend to use the weapons to inflict harm; and 2) has no prior history of such weapons violations.[13/]

13/ The sanction imposed in this decision is consistent with the agency's current guidance to agency employees pertaining to sanctions in weapons cases. The FAA's sanction guidance regarding weapons violations has changed since this case was initiated. Under the new guidance, a civil penalty up to $750 would be appropriate in cases involving a concealed unloaded firearm with accessible ammunition in carry-on baggage. See Change 16 to the Compliance and Enforcement Order, FAA Order No. 2150.3A, which amended Appendix 4, Sanction Guidance Table. The current policy does not provide specific guidance for a case in which the individual was carrying two knives in addition to an unloaded firearm with ammunition that would be accessible during flight.

Although this case was initiated before December 18, 1992, the issuance date of Change 16, there appears to be no reason to continue to assess the higher penalties called for under the former policy.

Accordingly, Respondent's appeal is denied. A $1000 civil penalty is assessed.[14/]

DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 10th day of March, , 1994.

14/ Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. App. § 1486), this decision shall be considered an order assessing civil penalty. See 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1992).